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Recovery in Louisiana Tort Law for Intangible Economic Loss: Negligence Actions and the Tort of Intentional Interference with Contractual Relations

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ARTICLES

RECOVERY IN LOUISIANA TORT LAW FOR INTANGIBLE ECONOMIC LOSS: NEGLIGENCE ACTIONS AND THE TORT OF INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS*

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Tort law has no special problem with economic loss as such. When the plaintiff has sustained a physical injury to his[1] person or to tangible property in which he had a proprietary interest, items of economic loss—e.g., loss of earnings and lost profits—are routinely awarded.

The special problem arises when someone who has not suffered physical injury to his person or tangible property seeks recovery for financial losses allegedly produced by defendant's conduct. The courts have been reluctant to recognize such losses as recoverable in tort; the intentional tort theories addressing the issue are fairly closely circumscribed,[2] and the "black-letter" negligence rule simply refused recovery.[3] An extensive literature refers to this problem by many names, the best of which is "intangible economic loss." This article uses that term, defining it to include all items of pecuniary loss (both out-of-pocket expenditures and losses of expected benefits) sustained by a plaintiff who has not suffered a physical injury to his person or tangible property.

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1. "The pronouns 'he,' 'his,' and 'him,' as used at various points in this [article], are not intended to convey the masculine gender alone; this usage is employed in a generic sense so as to avoid awkward grammatical situations which would likely occur due to the limitations of the English language." W. Prosser & P. Keeton, The Law of Torts xvii (5th ed. 1984).

2. See Perlman, Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine, 49 U. Chi. L. Rev. 60, 72-76 (1982).

3. But see infra text and notes 23-25.

I. INTENTIONAL TORT THEORIES IN GENERAL

The elements of the commonlaw intentional torts—battery, assault, false imprisonment, malicious prosecution, intentional infliction of emotional distress, and trespass to land—can be satisfied without any showing of physical injury to the plaintiff's person or tangible property.[4] Similarly, a plaintiff can recover for defamation without showing any physical injury to his person or tangible property.[5] Hence, all of these theories will often provide a basis for recovering intangible economic losses, although they do not specifically address that issue.

The Anglo-American intentional tort theories specifically addressing the intangible economic loss issue include misrepresentation (often called "fraud" or "deceit"),[6] injurious falsehood,[7] and intentional interference with contractual relations.[8] I have not found Louisiana decisions discussing the first two theories, although it is likely that both would be recognized if pressed.[9] On the other hand, intentional interference with contractual relations has been the focus of a great deal of recent attention.

II. INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS

Although at least one early Louisiana Supreme Court decision awarded recovery on the basis of intentional interference with contractual relations,[10] the "black-letter" Louisiana rule has

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4. See, e.g., Breaux v. South Louisiana Elec. Co-op, 471 So. 2d 967 (La. App. 1st Cir. 1985) (plaintiff had no cause of action for wrongful discharge from his employment, but stated a cause of action for intentional infliction of emotional distress).

5. See, e.g., WHC, Inc. v. Tri-State Road Boring, Inc., 468 So. 2d 764 (La. App. 1st Cir. 1985) (plaintiff had no cause of action for intentional interference with contract, but stated a valid claim for slander).

6. See W. Prosser & P. Keeton, The Law of Torts § 107 (5th ed. 1984) (hereinafter cited as *Prosser*); Restatement (Second) of Torts, §§ 525-51 (hereinafter cited as *Restatement*).

7. *Prosser*, § 128; *Restatement*, §§ 623A-52.

8. *Prosser*, §§ 129, 130; *Restatement*, §§ 766-74A.

9. The decision discussed infra, text accompanying notes 104-10, support recovery for negligent misrepresentation; recognizing a cause of action for intentional or reckless misrepresentation should be easier. At least one Louisiana decision recognizes an action for slander of title to immovable property (one of the subcategories of injurious falsehood). See L-M Co. v. Blanchard, 197 So. 2d 178 (La. App. 1st Cir.), cert. denied, 199 So. 2d 918 (La. 1967).

10. In Graham v. St. Charles St. R. Co., 47 La. Ann. 1656, 18 So. 707 (1985), plaintiff recovered on proving that defendant actively and systematically discouraged persons from patronizing plaintiff's grocery. The opinion is not forthright as to the theory of recovery, but the result is hard to explain on any basis other than recognition of the intentional interference cause of action.

refused to recognize this tort.[11] The other forty-nine states do recognize it.[12]

Louisiana courts have often found ways around the prohibition. The standard approach has been to find something independently tortious or wrongful about the *method* defendant used to interfere with plaintiff's contract. For example, recovery may be allowed when defendant interfered with plaintiff's contract by outrageous conduct,[13] by disparaging plaintiff's title to immovable property,[14] or by defaming the plaintiff.[15] Similarly, the courts have suggested that "conspiracy" between a successful bidder and the job-letting authority to "rig" a public bid might well be a tort.[16] And one recent supreme court decision invokes the doctrine of *abuse of rights* as a potential basis for recovery in an interference with contract case.[17]

For at least ten years, members of the supreme court have been signalling their intention to accept the tort of intentional interference.[18] The most recent and most important indication occurred in *Sanborn v. Oceanic Contractors*.[19] The *Sanborn* petition alleged that, after plaintiff quit his job with defendant in the United Arab Emirates (UAE), defendant refused to release plaintiff's work visa so that he could go to work for another company. Reading the petition as seeking recovery for intentional interference with contract, the lower courts sustained an exception of no cause of action. In a unanimous decision, the supreme court reversed and remanded to give plaintiff another chance to plead a cause of action, holding: (1) On the basis of facts appearing in the record, plaintiff could have alleged that the UAE Immigration Rules

11. See Kline v. Eubanks, 109 La. 241, 33 So. 211 (1902); Moss v. Guarisco, 409 So. 2d 323 (La. App. 1st Cir. 1981), cert. denied, 412 So. 2d 540 (La. 1982); Eximco, Inc. v. Trane Co., 737 F.2d 505, 511 (5th Cir. 1984).

12. See *Prosser*, supra note 6, § 129.

13. See *Breaux*, 471 So. 2d at 967; Carson v. Stephens, 129 So. 381 (La. App. 2d Cir. 1930) (defendant liable for stirring up racial prejudices against plaintiff's contractee).

14. See Martin v. Sterkx, 146 La. 489, 83 So. 776 (1920).

15. See WHC, Inc. v. Tri-State Road Boring, Inc., 468 So. 2d 764 (La. App. 1st Cir. 1985).

16. See Haughton Elevator Div. v. State, 367 So. 2d 1161, 1169 n.9 (La. 1979); Alexander & Alexander, Inc. v. State, 470 So. 2d 976 (La. App. 1st Cir.), cert. granted, 476 So. 2d 338 (La. 1985); Millette Enterprises, Inc. v. State, 417 So. 2d 6, 10 (La. App. 1st Cir.), cert. granted, 417 So. 2d 363 (La. 1982).

17. Sanborn v. Oceanic Contr., 448 So. 2d 91 (La.1984).

18. See PPG Industries, Inc. v. Bean Dredging, 447 So. 2d 1058, 1059 n.1 (La. 1984) (Justice Lemmon); Moss v. Guarisco, 409 So. 2d 323 (La. App. 1st Cir. 1981), cert. denied, 412 So. 2d 540 (La. 1982) (Justices Dennis, Lemmon, and Watson, dissenting from writ refusal); Desormeaux v. Central Industries, Inc., 333 So. 2d 431 (La. App. 3d Cir.), cert. denied, 337 So. 2d 225 (La. 1976) (Justices Summers and Tate, dissenting from writ refusal).

19. 448 So. 2d 91 (La. 1984).

imposed a duty on defendant to release the visa. (2) Even if the UAE Immigration Rules gave defendant the right to withhold the visa, defendant's exercise of that right without any legitimate motive might constitute an actionable abuse of rights. (3) Plaintiff might be able to allege a valid cause of action for tortious interference with contractual rights. Justice Calogero, writing for the court, referred to the recent intimations of sympathy for the intentional interference theory, and suggested that, if recognized, it would probably require the plaintiff to plead and prove (a) intentional and willful interference with the plaintiff's contract, which was (b) a proximate cause [sic] of the failure of the contract and (c) motivated by malice or at least by no significant interest of defendant's own. Justice Lemmon, concurring, believed that the petition as it stood was sufficient to state a cause of action for intentional interference with contract.

Sanborn comes about as close to recognizing the cause of action as a court could come without actually granting or affirming a recovery on that basis. Full recognition of the intentional interference tort, surely just a short step away, will improve the symmetry and consistency of Louisiana tort law; it is very difficult to reconcile continued rejection of this tort with recent decisions expanding negligence liability for intangible economic loss.[20] Clarity will also be furthered. While the boundaries of the intentional interference tort have not been easy to draw,[21] eliminating the necessity for inquiring into the independent wrongfulness of defendant's methods will at least remove an entire layer of indirection and consequent obfuscation from the process.[22]

III. Intangible Economic Loss Caused By Defendant's Negligence: Overview

Traditionally the Anglo-American courts refused recovery for intangible economic loss produced by negligent conduct.[23] Courts often avoided the traditional rule by finding a contractual basis for recovery, such as subrogation or third-party beneficiary status for plaintiff.[24] Further, the rule came to be subject to so many exceptions that it sometimes seemed to have disappeared beneath them.[25] Still, it has remained at least a

20. See infra text and notes 104-10.

21. See *Prosser*, supra note 6, §§ 129, 130.

22. But see Perlman, supra note 2, arguing that the tort should be restricted to unlawful means cases. Perlman ignores the Louisiana experience.

23. See, e.g., People Express Airlines v. Consolidated Rail, 100 N.J. 246, 251, 495 A.2d 107, 109 (1985) ("[A] virtually per se rule barring recovery for economic loss unless the negligent conduct also caused physical harm has evolved throughout this century.")

24. See *Prosser*, supra note 6, § 129 at 997-1002.

25. Two major exceptions are negligent misrepresentation (see *Restatement*, supra note 6, § 552) and public nuisance (id., § 821B, comment (e), § 821C & comment (h)).

prima facie obstacle to recovery. (In this article the traditional view is sometimes referred to as "the prohibitory rule.")

The prohibitory rule was bottomed on generalized fears of multitudinous claims and limitless liability. These concerns have been called "the floodgates argument."[26] Perhaps the best-known articulation of the floodgates argument was Justice Cardozo's statement in the *Ultramares* case.[27] Refusing to hold a negligent accounting firm liable to persons who suffered financial harm through reliance on an erroneous certified balance sheet prepared by defendant, Justice Cardozo stated:

> If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft of forgery beneath the cover of deceptive entries, may expose accountants to a *liability in an indeterminate amount for an indeterminate time to an indeterminate class*. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.[28]

Of course, fears of "indeterminate" liability are pervasive in negligence law.[29] But they take on particular force in economic loss cases, because such cases ordinarily lack any physical or other "natural" limit on the operation of causation in fact. The idea was this:

> In cases of physical injury to persons or property, the task of defining liability limits is eased, but not eliminated, by the operation of the laws of physics. Friction and gravity dictate that physical objects eventually come to rest. The amount of physical damage that can be inflicted by a speeding automobile or a thrown fist has a self-defining limit. Even in chain reaction cases, intervening forces generally are necessary to restore the velocity of the harm-creating object. These intervening forces offer a natural limit to liability.
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> The laws of physics do not provide the same restraints for economic loss. Economic relationships are intertwined so intimately that disruption of one may have far-reaching consequences. Furthermore, the chain reaction of economic harm flows from one person to another without the intervention of other forces. Courts facing a case of pure economic loss thus

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26. See R. Dias & B. Markesinis, Tort Law 20-22 (1984).

27. Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931).

28. Id. at 179-80, 174 N.E. at 444 (emphasis supplied).

29. See, e.g., Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928); Robertson, Reason Versus Rule in Louisiana Tort Law: Dialogues on Hill v. Lundin & Associates, Inc., 34 La. L. Rev. 1 (1973).

> confront the potential for liability of enormous scope, with no easily marked intermediate points and no ready recourse to traditional liability-limiting devices such as intervening cause.[30]

Probably the suggested contrast between physical and economic harms has lost much of its force. The distinction may have been plausible when the worst imaginable "floodgates" problem stemming from physical harms would have been all of Chicago suing Mrs. O'Leary's cow.[31] But now that we have witnessed tragedies and narrow escapes such as the incidents at Three-Mile Island, Bhopal, and Love Canal; now that we are participants or spectators at litigation involving Agent Orange, bendectin, the Dalkon Shield, and asbestos; now that we know the terrifying nature of substances routinely transported by railroads and vessels; now that we live with the threat of nuclear accident and toxic waste contamination, it is hard to think of "expos[ing] accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class"[32] as our most perplexing scope-of-liability problem.[33]

The problem of intangible economic loss has produced an extensive literature.[34] Fortunately, two recent decisions—careful study of which seems indispensable for an understanding of the economic loss problem—review much of the literature and otherwise provide a focal point for analysis.

A. The Testbank Case

In *State Ex Rel. Guste v. M/V Testbank*,[35] negligence in the operation of defendants' vessel caused a chemical spill requiring the Mississippi River Gulf Outlet Channel and four hundred square miles of surrounding wetlands to be closed for almost a month. Many persons and businesses suffered intangible economic losses. The types of claimants before the trial court (in forty-one consolidated lawsuits) included commercial fishermen who regularly operated in and around the closed area; operators of marinas and boat rentals; marine suppliers; tackle and bait shops; wholesale and retail seafood enterprises; seafood res-

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30. Perlman, supra note 2, at 72-72.

31. New York courts handled the problem of catastrophic fire liablility by adopting the arbitrary "first structure" rule of Ryan v. New York Central R.R. Co., 35 N.Y. 210 (1866). See *Prosser*, supra note 6, § 43 at 282. See also the cases refusing liability against water companies who fail to meet fire-fighting needs, discussed in *Prosser*, supra note 6, § 93 at 671.

32. See supra text and note 28.

33. For a similar point, see James, Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal, 25 Vand. L. Rev. 50 (1972).

34. See, e.g., the sources cited in *Prosser*, supra note 6, §§ 129, 130; and in the opinions in the *Testbank* case, infra note 35.

35. 752 F.2d 1019 (5th Cir. 1985) (*en banc*).

taurants; and operators of trapped or delayed vessels. Invoking the prohibitory rule, the trial judge granted summary judgment against all claimants except the commercial fishermen.

The appeal to the Fifth Circuit Court of Appeals was from the grant of summary judgment; the correctness of the trial judge's ruling preserving the commercial fishermen's rights was not before the appellate court. The *en banc* court of appeals split ten to five.[36] The majority agreed with the trial court's denial of recovery to everyone except the commercial fishermen. The dissenters argued for recovery for many of the interests before the court. Both sides had ample precedent to draw on; the majority stressed the decisions supporting the prohibitory rule, while the dissent stressed the numerous case-law exceptions. The most useful feature of the opinions is their dialogue on tort policy.

Judge Higginbotham's opinion for the *Testbank* majority was a celebration of the perceived wisdom of the prohibitory rule. It first stressed an *administrative* argument: Courts need a "bright line rule."[37] "Those who would delete the requirement of physical damage have no rule or principle to substitute."[38] The majority impunged the normal scope-of-liability approaches—proximate cause, legal cause, or scope of duty—as mere "ad hoc" devices, lacking workability.[39] For the dissenters, Judge Wisdom responded:

> [T]he utility derived from having a "bright line" boundary does not outweigh the disutility caused by the limitation on recovery imposed by the physical damage requirement. [A requirement of physical damage represents] a wide departure from the usual tort doctrines of foreseeability and proximate cause. Those doctrines, as refined in the law of public nuisance, provide a rule of recovery that compensates innocent plaintiffs and holds the defendants liable for much of the harm proximately caused by their negligence. . . .[40]
>
> The limitation imposed by "particular" damages [derived from public nuisance law], together with refined notions of proximate cause and foreseeability [sic], provides a workable scheme of liability that is in step with the rest of the tort law, compensates innocent plaintiffs, and imposes the costs of harm on those who caused it.[41]

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36. Four of the five Louisiana judges dissented; Judge Davis joined the majority.
37. 752 F.2d at 1029.
38. Id. at 1028.
39. Id.
40. Id. at 1045-46.
41. Id. at 1046.

The majority next turned to a *jurisprudential* or *philosophical* argument, contending that determining scope of liability issues by the case-by-case application of principles of proximate cause or scope of duty is not respectable judicial activity; unless a court relies on "preexisting rules," it is engaging in "management," not "adjudication."[42] Judge Wisdom's response turned that argument on its head, observing that what really looks like mere "management" is automatic adherence to a bright-line prohibitory rule, whereas deciding individual cases on the basis of principle, policy, and justice is the highest judicial function.[43] Saying "no" to all plaintiffs is at least as arbitrary as saying "no" to some and "yes" to others on a more discriminating basis.[44] Finally, the majority made two *economic* arguments. The first contended that no additional incentive for safety is provided by imposing liability in catastrophic proportions.[45] Judge Wisdom answered:

> Imposition of liability upon the shippers helps ensure that the potential tortfeasor faces incentives to take the proper care. The majority's point is well taken that the incentives to avoid accidents do not increase once potential losses pass a certain measure of enormity. But in truth we have no idea what this measure is: Absent hard data, I would rather err on the side of receiving little additional benefit from imposing additional quanta of liability than err by adhering to *Robins*' inequitable rule and bar victims' recovery on the mistaken belief that a "marginal incentive curve" was flat, or nearly so. If a loss must be borne, it is no worse if a "merely" negligent defendant bears the loss than an innocent plaintiff absorb the damages.[46]

The majority's second economic argument observed that first-party insurance (loss insurance obtained by properly prudent victims) is a superior risk-spreading mechanism to third-party (liability) insurance.[47] The dissenting opinion replied that we know nothing about the availability of loss insurance against the kinds of losses suffered by the victims, whereas we "do know that [liability] insurance against this kind of loss is already available for shippers."[48]

In the end, the plausibility of the *Testbank* dissent rests upon the perceived soundness or unsoundness of the result its approach would have achieved. The dissenters would have permitted recovery (for out

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42. Id. at 1028-29.
43. Id. at 1052 n. 38.
44. Id. at 1049.
45. Id. at 1029.
46. Id. at 1052.
47. Id. at 1029.
48. Id. at 1052.

of pocket expenses and lost profits) on behalf of the commercial fishermen and the trapped and delayed vessels. Recovery for some of the land-based businesses—drydocks, marinas, bait and tackle shops, seafood processors, and seafood wholesalers—would have been allowed on a showing that "their business of supplying a vital commodity or service to those engaged in the maritime industry has been interrupted by the collision, the closure, or the embargo."[49] Seafood restaurants would be excluded. They "are not providers of a vital service to the afflicted area. Their damage is not sufficiently distinguishable from general economic dislocation to allow for recovery."[50] Also excluded would be any business "not sufficiently involved with the afflicted area as a supplier of vital inputs peculiar to maritime activity."[51]

While it is admittedly difficult to state criteria for distinguishing between "vital" and other inputs,[52] or between damages specifically keyed to the defendant's event and "general economic dislocation," the intuitions that Judge Wisdom suggests would be employed in drawing those lines, case by case, are not qualitatively different from those traditionally at work on scope of liability issues in physical injury cases. Certainly the position of the *Testbank* dissenters is as principled and as "adjudicatory" as that of the majority. One must admit that the line between recovery and nonrecovery may appear as arbitrary under a rule of proximate cause as a line created by a requirement for physical damages. In a sense, any line that the courts draw to limit recovery is arbitrary. But this dissent attempts to draw lines which comport more closely with principles of intrinsic fairness than the line based on physical damage.[53]

Is a big, bright-line prohibitory rule, treating intangible economic losses differently from other injuries, better tort policy than an approach requiring the courts to confront the scope of liability issue for each

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49. Id. at 1050.

50. Id.

51. Id. at 1051.

52. The "vital inputs" criterion is not directed at the importance or legitimacy of plaintiff's business, but rather at the closeness of the connection between plaintiff's business and the use of the river. Judge Wisdom used the "particular damage" concept to the same effect:

> In a maritime accident, a business suffers "particular" damages to the extent that the accident prevents the business from engaging in primary maritime activities, such as fishing or use of the waterways, or supplying commodities or services vital to primary maritime activities, such as those of bait and tackle shops, drydocks, marinas, and seafood wholesalers or processors. All other losses that are not peculiar to maritime activities are part of the general economic dislocation caused by the accident and are therefore not "particular."

752 F.2d at 1049.

53. Id.

type of plaintiff and each item of claimed damages? Leon Green would not have found much difficulty with the question:[54]

> [R]ules of law tend to become less and less dependable, and more and more fluid as society becomes more complex and people more intelligent.[55] The formula can not be invented which relieves the judges and juries from the painful necessity of using their good sense in deciding cases.[56] Intelligence and formulas soon part company.[57] Rules will carry those who must pass judgment only so far, figuratively speaking, into the neighborhood of the problem to be passed upon, and then the judges must get off and walk.[58]

B. People Express v. Consolidated Rail

The other indispensable recent opinion is *People Express Airlines v. Consolidated Rail*.[59] The defendants' negligence caused a dangerous gas to escape from a railroad car. Fearing explosion, defendants and the local authorities worked out an evacuation plan covering the area within a one-mile radius. Included was plaintiff-airline's Newark terminal. Plaintiff suffered a twelve-hour business shutdown, and sued in tort for its losses. The trial court applied the prohibitory rule, granting summary judgment for defendant.

The New Jersey Supreme Court disagreed. The court first explained its dissatisfaction with the prohibitory rule. (1) It is a general product of the courts' "fear of fraudulent claims, mass litigation, and limitless liability."[60] But those same concerns are present in physical injury cases, and courts have managed to cope by applying general scope of liability principles. (2) Denying all recovery for intangible economic loss is out of step with the rest of tort law, including especially the recent trend toward permitting recovery for emotional distress arising from physical harm to another. "The answer to the allegation of unchecked liability is not the judicial obstruction of a fairly grounded claim for redress. Rather, it must be a more sedulous application of traditional concepts of duty and proximate cause to the facts of each case."[61] (3) The prohibitory rule is often unjust. The physical harm requirement capri-

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54. See generally Robertson, The Legal Philosophy of Leon Green, 56 Tex. L. Rev. 393 (1978).

55. Green, Book Review, 38 Yale L.J. 402, 403 (1929).

56. L. Green, Judge and Jury 264 (1930).

57. L. Green, Rationale of Proximate Cause 121 (1927).

58. L. Green, supra note 56, at 214.

59. 100 N.J. 246, 495 A.2d 107 (1985).

60. Id. at 252, 495 A.2d at 110.

61. Id. at 254, 495 A.2d at 111.

ciously showers compensation along the path of physical destruction, regardless of the status or circumstances of individual claimants. Purely economic losses are borne by innocent victims, who may not be able to absorb their losses. . . . In the end, the challenge is to fashion a rule that limits liability but permits adjudication of meritorious claims.[62]

(4) The prohibitory rule ill serves the objectives of tort law; it diminishes the incentives for safety and fails to shift the loss of dangerous activities to those best able to bear them.

Turning to the numerous exceptions to the prohibitory rule, the *People Express* court discerned two common threads.

> The first is that the element of foreseeability emerges as a more appropriate analytical standard to determine the question of liability than a *per se* prohibitory rule. The second is that the extent to which the defendant knew or should have known the particular consequences of his negligence, including the economic loss of a particularly foreseeable plaintiff, is dispositive of the issues of duty and fault.[63]

The resultant approach was very similar to the *Testbank* dissent. The *People Express* court distilled it into a requirement of "particular foreseeability," articulated as follows:

> We hold . . . that a defendant owes a duty of care to take reasonable measures to avoid the risk of causing economic damages, aside from physical injury, to particular plaintiffs or plaintiffs comprising an identifiable class with respect to whom defendant knows or has reason to know are likely to suffer such damages from its conduct. . . . An identifiable class of plaintiffs must be particularly foreseeable in terms of the type of persons or entities comprising the class, the certainty or predictability of their presence, the approximate numbers of those in the class, as well as the type of economic expectations disrupted.[64]

Applying that approach to the facts before it, the court held that plaintiff should recover.

> Among the facts that persuade us that a cause of action has been established is the close proximity of [plaintiff's terminal] to [defendant's] freight yard; the obvious nature of the plaintiff's operations and particular foreseeability of economic losses resulting from an accident and evacuation; the defendants' actual

62. Id., 495 A.2d at 111.
63. Id. at 256, 495 A.2d at 112.
64. Id. at 263, 495 A.2d at 116.

> or constructive knowledge of the volatile properties of ethylene oxide; and the existence of an emergency response plan prepared by some of the defendants . . . , which apparently called for the nearby area to be evacuated. . . . We do not mean to suggest . . . that actual knowledge of the eventual economic losses is necessary . . . ; rather particular foreseeability will suffice.[65]

The "particular foreseeability"[66] approach appears to be gaining favor as a way of bringing the treatment of intangible economic loss into the negligence-law mainstream. The *People Express* court derived the approach, in major part, from the law of negligent misrepresentation,[67] which has been the most significant exception to the prohibitory rule.[68] This approach is virtually identical to the proposal in the Prosser and Keeton treatise that "limitation to specifically foreseeable plaintiffs . . . may suggest an ultimate solution to the problem,"[69] and it is consistent with the approach that is emerging in the British cases.[70] It is much more discriminating and fairness-oriented than the prohibitory rule, and it does not demonstrably offend any of the law's policies. One may hope that *People Express* and the *Testbank* dissent represent the wave of the future.

C. The "Floodgates Factors" and the Different Types of Intangible Economic Loss Cases

Negligently inflicted intangible economic loss is often thought of as a single, big problem,[71] but clarity of analysis might be furthered by treating it as three or four small problems, i.e., by breaking the problem down into subcategories or case types.[72] Subcategorization seems appro-

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65. Id. at 267-68, 495 A.2d at 118.

66. The corresponding Louisiana term might be "particular ease of association." See Crowe, The Anatomy of a Tort—Greenian, As Interpreted by Crowe Who Has Been Influenced by Malone—A Primer, 22 Loyola L. Rev. 903, 907 (1976).

67. 100 N.J. at 257-58, 495 A.2d at 112-13.

68. See supra text and note 25.

69. *Prosser*, supra note 6, §129 at 1001.

70. See Dias & Markesinis, supra note 26, at 20-22, 42-51.

71. See, e.g., Rizzo, A Theory of Economic Loss in the Law of Torts, 11 J. Leg. Stud. 281, 282 n.3 (1982); Perlman, supra note 2, at 71-72 & n.64.

72. Several commentators subdivide the area into (1) cases in which plaintiff suffers economic loss because of physical injury to the person or property of another, and (2) cases in which plaintiff's economic loss stems from defendant's negligence in the performance of a contractual or professional undertaking with another to supply information, etc. See James, supra note 33, at 43; Atiyah, Negligence and Economic Loss, 83 L.Q. Rev. 248, 256 (1967); Rabin, Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment, 37 Stan. L. Rev. 1513, 1527-28 (1985). Cf. Probert, Negligence and Economic Damage: The California-Florida Nexus, 33 U. Fla. L. Rev. 485, 485-86 & n. 4 (1981);

priate; the factors influencing the courts' reactions to the propriety of allowing recovery for intangible economic loss seem to cluster in different ways in different types of cases.

A complete list of the factors that trouble courts grappling with extent-of-liability problems would exhaust all of tort law.[73] However, at least the following "floodgates factors"[74] seem dramatically influential in the intangible economic loss cases:

(1) the existence and nature of any relationship between plaintiff and defendant that existed before the damage was sustained;

(2) the degree to which plaintiff may be seen to have been entitled to rely on defendant's exercising reasonable care;

(3) whether there is another entity from whom plaintiff might more reasonably seek redress;

(4) whether, even if plaintiff's action is denied, the aims of deterrence will still be served because someone other than plaintiff is in position to sue defendant for the negligent conduct;

(5) the extent to which redressing plaintiff's injuries might expose this defendant and future defendants to unknown or potentially very extensive liability;

(6) the extent to which redressing plaintiff's injuries might loose a flood of litigation;

Wilkinson & Forte, "Pure Economic Loss—A Scottish Perspective, 1985 Jurid. Rev. 1, 8-9 (1985). The Torts (Second) Restatement, supra note 6, gives no overview of the intangible economic loss problem, but scatters its treatment through the sections on "negligent interference with contract or prospective contractual relation" (§ 766C), and "public nuisance" (§§ 821B, 821C). See especially § 766C comment (e) and § 821C comment (h).

73. A similar but less extensive list of policy factors bearing on the wisdom of extending or constricting the scope of negligence liability appeared in the following landmark California decisions: J'Aire Corp. v. Gregory, 24 Cal. 3d 799, 598 P.2d 60 (1979) (recognizing liability for economic loss resulting from defendant's negligent performance of a contractual undertaking between defendant and plaintiff's lessor); Tarasoff v. Regents of Univ. of California, 17 Cal. 3d 325, 551 P.2d 334 (1976) (holding psychiatrist to an affirmative duty to warn the intended victims of defendant's potentially violent patient); Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561 (1968) (rejecting the traditional categories of premises-defect victims and holding land occupier to a duty of reasonable care under the circumstances to all such victims); Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958) (recognizing a cause of action by disappointed legatee against notary public whose negligence rendered the will ineffective).

74. The term "floodgates factors" is chosen for convenience of reference; it is not intended to suggest either approval or disapproval of the imposition of liability in particular instances.

(7) whether granting recovery to plaintiff could encourage collusive or fraudulent claims;

(8) the relative difficulty to plaintiff and defendant of avoiding or insuring against the type of loss suffered by plaintiff.

Assuming that the summarized "floodgates factors" reasonably indicate the range of judicial concerns called forth by the problem of intangible economic loss, the situations that have given rise to frequent litigation seem to fall into four categories:[75]

(A) Defendant's negligent conduct causes physical injury to the person or property of another; plaintiff loses an economic benefit he expected to derive from the other's person or property.

(B) Defendant's negligent conduct causes physical injury to the person or property of another; plaintiff repairs that damage and seeks reimbursement.

(C) Defendant's negligence in the performance of an undertaking with another[76] causes economic loss to plaintiff.

(D) Defendant's negligent impairment of the environment or other public resource causes economic loss to plaintiff.

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75. The categories in the text are intended to cover the recurrent types of cases, and are not necessarily exhaustive. See also infra note 101. One situation that does not seem to fit the scheme in the text involves defendant's negligence depriving plaintiff of the expectation of being compensated (by someone other than defendant) for physical harm suffered by plaintiff. See Williams v. State, 34 Cal. 3d 18, 644 P.2d 137 (1983) (traffic policeman's negligent failure to identify tortfeasor cost plaintiff her traffic negligence action; cause of action against policeman recognized); Wilkinson v. Coverdale, (1973) (K.B.), 1 Esp. 74, [1975-1802] All. E.R. Rep. 339 (recognizing cause of action for defendant's negligence in failing to renew plaintiff's fire insurance policy). Rabin, supra note 72, at 1514-16, 1538, points out that such cases sometimes award recovery without noting any "economic loss" issue, and cites that omission as evidence supporting his thesis that the "economic loss" issue troubles judges principally when they perceive that liability will be greatly disproportionate to defendant's degree of blameworthiness. (For a similar suggestion, see James, supra note 72, at 48-51.) A simpler explanation of cases like *Williams* is that the harm caused by defendant—loss of a cause of action for physical injury—is so intimately involved with physical injury that the economic loss argument is simply overlooked. (Compare the cases in which Tortfeasor A, cast in judgment to a physically injured victim, seeks indemnity from Tortfeasor B. Sometimes these decisions characterize A's action as seeking recovery for economic loss. See, e.g., General Motors Corp. v. Simmons, 558 S.W.2d 855, 860 (Tex. 1977). But more often they do not. See, e.g., Heil Co. v. Grant, 534 S.W.2d 916, 927 (Tex. Civ. App. 1976, writ ref., n.r.e.). One might say that the "normal" way to think about these problems is as physical harm problems.)

76. When the undertaking was with the plaintiff, settled principles of misrepresentation law will generally permit recovery in the relatively few instances in which contract theory does not. See *Restatement*, supra note 6, § 766C comment (e).

The foregoing breakdown seems to help in analyzing the general Anglo-American economic loss jurisprudence.[77] Whether or not that turns out to be true, it is at least a workable approach to the relevant Louisiana jurisprudence.

IV. INTANGIBLE ECONOMIC LOSS CAUSED BY DEFENDANT'S NEGLIGENCE: THE LOUISIANA VIEW

In large outline, the course of the Louisiana jurisprudence treating negligently-inflicted intangible economic loss closely resembles other Louisiana tort stories. With respect to a surprising number of tort issues, the history seems to have been: (1) scattered early decisions recognizing the cause of action and noting no particular problem with it; (2) the gradual or sudden emergence of negative judicial attitudes, often borrowed from the common law; (3) the crystallization of those attitudes into a "black-letter" prohibitory rule; (4) modern reexamination and alteration of the prohibitory rule.[78]

After early Louisiana decisions had allowed recovery for negligently caused intangible emotional loss,[79] a "black-letter" prohibitory rule grew from the decision in *Forcum-James Co. v. Duke Transportation Co.*[80] Recent decisions have undermined the *Forcum-James* rule. Tracing the relevant developments is assisted by subdividing the jurisprudence into the categories of cases suggested above.

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77. In the leading common law cases of the first type, recovery was almost uniformly disallowed. See Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 48 S. Ct. 134 (1927); Cattle v. Stockton Waterworks Co., L.R. 10 Q.B. 453 (C.A. 1875); Spartan Steel & Alloys, Ltd. v. Martin & Co., [1973] 1 Q.B. 27; Stevenson v. East Ohio Gas Co., 73 N.E.2d 200 (Ohio App. 1946); Byrd v. English, 43 S.E. 419 (Ga. 1903). I have not researched the second type of case at common law. In the leading cases of the third type at common law, plaintiffs have frequently prevailed. See J'Aire Corp. v. Gregory, 598 P.2d 60 (Cal. 1979); Biakanja v. Irving, 320 P.2d 16 (Cal. 1958); Junior Books v. Veitchi Co., [1983] A.C. 520; Hedley, Byrne & Co. v. Heller & Partners, [1964] A.C. 465; Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922). But see Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931). The leading cases of the fourth type include *Testbank* (except for fishermen, recovery denied); *People Express* (recovery allowed); and Weller & Co. v. Foot & Mouth Disease Research Inst., [1966] 1 Q.B. 569 (recovery denied).

78. This has been the story respecting the intentional tort of interference with contract, see supra text and notes 10-22. It was also the story with comparative negligence. See Malone, Comparative Negligence—Louisiana's Forgotten Heritage, 6 La. L. Rev. 125 (1945). According to Alston Johnson's December 6, 1985 presentation to the Louisiana Judicial College, the same stages occurred respecting punitive damages. And one suspects careful research would reveal a very similar progression on the problem of emotional distress.

79. See Pharr v. Morgan's L. & T. R. & S.S. Co., 115 La. 138, 38 So. 943 (1905).

80. 231 La. 953, 93 So. 2d 229 (1957).

A. Defendant's Negligent Infliction of Physical Harm to the Person or Property of Another Damaged Plaintiff's Economic Expectations: The "Cable Cases"

Probably the most frequent type of intangible economic loss case at common law and in Louisiana has been the situation in which defendant's negligence damages the property of another and plaintiff loses expected benefits from use of that property. These are sometimes called the "cable cases,"[81] because a recurrent fact pattern has defendant negligently cutting off plaintiff's power supply.[82] (In another recurrent fact pattern, defendant negligently injures plaintiff's employee or some other person with whom plaintiff has contracted for services.[83])

Until very recently, the Louisiana answer in these cases was a quick "no." Many of these decisions merely invoked the prohibitory rule, without much explanation.[84] But some explained. In *Desormeaux v. Central Industries, Inc.*,[85] plaintiff's father had agreed to supply water for plaintiff's crops via an irrigation system owned by the father. Defendant negligently damaged the system, interrupting the supply. The court of appeal's opinion invoked the prohibitory rule, but also offered an explanation evoking "floodgates factors" (3) and (4): "[Plaintiff] could have sued his father who had contracted to supply him with irrigation water. The father in turn could have sued the tort-feasor . . . ."[86]

The supreme court's recent decision in *PPG Industries, Inc. v. Bean Dredging*[87] probably signals a major change in the law. Defendant negligently cut a Texaco pipeline, interrupting plaintiff's fuel supply. The lower courts used the prohibitory rule to dismiss plaintiff's petition, citing *Forcum-James*. The supreme court disapproved the *Forcum-James* rule, stating that the flat prohibition should yield to careful case-by-case application of the duty-risk analysis. The *PPG* approach is thus generally the same as that applied by the *People Express* court and urged by the *Testbank* dissent. But the *PPG* court failed to follow its own approach. Affirming the denial of recovery, the majority stated

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81. Dias & Markesinis, supra note 26, at 20.

82. See *PPG*, 447 So. 2d at 1058; Desormeaux v. Central Industries, Inc., 333 So. 2d 431 (La. App. 3d Cir.), cert. denied, 337 So. 2d 225 (La. 1976).

83. See Baughman Surgical Assoc. v. Aetna Cas. & Sur. Co., 302 So. 2d 316 (La. App. 1st Cir. 1974); Messina v. Sheraton Corp., 291 So. 2d 829 (La. App. 4th Cir. 1974).

84. See Baughman & Messina, supra note 83.

85. 333 So. 2d 431 (La. App. 3d Cir.), cert. denied, 337 So. 2d 225 (La.1976) (Justices Summers and Tate, dissenting from writ refusal).

86. 333 So. 2d at 435. Justice Tate's dissent from the refusal of writs called for reexamination of the *Forcum-James* rule. 337 So. 2d at 225.

87. 447 So. 2d 1058 (La. 1984).

that allowing recovery to plaintiff could open the litigation floodgates,[88] and that plaintiff's injury was not easily associated with the purposes of the rule violated by defendant. Justice Calogero's dissent applauded the demise of the prohibitory rule, but argued that plaintiff's was about as meritorious an economic loss case as could ever arise: Defendant was dredging right alongside plaintiff's plant, the pipeline was plainly marked by signs and charts, and it obviously ran straight to plaintiff's plant.

The concluding subsection of this article discusses *PPG* and the subsequent cases from a more general perspective.[89] For the present, note that the prohibitory rule is formally dead, and that the approved approach is a case-by-case determination of the merits and policy justifications for recognizing particular claims. *PPG* was a "cable case," but its effects should not be confined to that category. The opinion itself is not confined to cable cases, but addresses the intangible economic loss problem at large. Further, Louisiana courts have been somewhat more reluctant to award recovery in the cable cases than in the categories discussed below. Therefore, it seems clear that the rejection of the prohibitory rule in *PPG* is applicable throughout the intangible economic harms area.

B. Defendant Negligently Damaged the Person or Property of Another, Plaintiff Repaired It and Seeks Reimbursement: The "Indemnity Cases"

When defendant negligently causes personal injury or property damage to *A*, sometimes *B* pays for or repairs the damage and sues defendant for reimbursement. If *B* was clearly obligated to repair the damage, usually subrogation theories will afford a basis for recovery.[90] If *B* was not so obligated, or might not have been, subrogation theories are less promising. Still, *B* has done something the law should approve and encourage.[91] Furthermore, there is no significant "floodgate" problem

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88. "[I]mposition of responsibility on the tortfeasor for such damages could create liability 'in an indeterminate amount for an indeterminate time to an indeterminate class.'" 447 So. 2d at 1061 (quoting *Ultramares*).

89. See infra text and notes 118-22.

90. Loss insurers are often subrogated to the insured's claims against the tortfeasor. See Audubon Ins. Co. v. Ford, 453 So. 2d 232 (La. 1984); Sentry Indem. Co. v. Rester, 430 So. 2d 1159 (La. App. 1st Cir. 1983); Johnson, Legal Subrogation of Insurer to Insured's Rights Upon Payment of Claim, 39 La. L. Rev. 675 (1979). An employer or insurance carrier who pays workers' compensation or maintenance and cure benefits to an injured employee is entitled, via subrogation or something like it, to recovery against the tortfeasor. See Louviere v. Shell Oil Co., 409 F.2d 278, 284-85 (5th Cir. 1975); Roberts v. Stuyvesant Ins. Co., 198 So. 2d 685 (La. App. 1st Cir. 1967).

91. See A.V. Smith Const. Co. v. Maryland Cas. Co., 422 So. 2d 697 (La. App. 3d Cir. 1982), appeal after remand, 450 So. 2d 39 (La. App. 3d Cir. 1984), in which

in such cases. The damages *B* seeks are known, finite, and limited; only one *B* can repair such damage and seek reimbursement; and the courts can easily insure that defendant is not made to pay twice for the same harm.[92] There really should be a basis for *B*'s recovery, and the courts have generally found one. While the great majority of the Louisiana cases of this type have found a basis for awarding recovery, the courts have looked to doctrinal sources other than negligence law. When subrogation theories did not work,[93] the courts used principles of unjust enrichment, quasi contract, and/or *negotiorum gestio*.[94] The courts have been creative in finding ways to make the plaintiff whole.

However, in cases in which none of those theories worked (or was pleaded or argued) and plaintiff proceeded solely on the basis of negligence, the rule was to deny recovery.[95] *Forcum-James* was one of these cases.[96] They were genuinely unfortunate decisions. Results should not be made to turn on whether plaintiff's counsel had the wit to plead unjust enrichment or *negotiorum gestio*. Given the liberality with which those doctrines have been used in the "indemnity" cases, the few denials of recovery appear as pleading traps for the unwary. If the *PPG* decision accomplishes nothing else, certainly it should remove any basis for denial of tort recovery in these cases.

B, doing work for a school board, repaired fire damage caused to school buildings by defendant, and achieved reimbursement on the basis of quasi-contract and/or *negotiorum gestio*. See also Standard Motor Car Co. v. State Farm Mut. Auto. Ins. Co., 97 So. 2d 435 (La. App. 1st Cir. 1957), in which B was an auto repairer, road testing a customer's car when defendant negligently damaged it. B repaired the damage, and achieved reimbursement from defendant on the basis of *negotiorum gestio* principles. But see Hebert v. Louisiana & Arkansas Ry. Co., 433 So. 2d 807 (La. App. 1st Cir.), cert. denied, 441 So. 2d 771 (La. 1983). In *Hebert*, the car damaged by defendant's negligence was leased for B's use by his employer. B repaired the damage and was denied reimbursement on the basis of *Forcum-James*.

92. See Audubon Ins. Co. v. Ford, 453 So. 2d 232 (La. 1984) (defendant settled with its victim without notice of a loss insurer's subrogation claim, and was held protected by the settlement).

93. See supra text and note 90.

94. The decisions have not clearly distinguished between these theories. For instances in which one or more of them justified recovery, see Minyard v. Curtis Products, Inc., 251 La. 624, 205 So. 2d 422 (1967); A.V. Smith Constr. Co. v. Maryland Cas. Co., 422 So. 2d 697 (La. App. 3d Cir. 1982), appeal after remand, 450 So. 2d 39 (La. App. 3d Cir. 1984); Standard Motor Car Co. v. State Farm Mut. Auto. Ins. Co., 97 So. 2d 435 (La. App. 1st Cir. 1957).

95. See, e.g., Hebert v. Louisiana & Arkansas Ry. Co., 433 So. 2d 807 (La. App. 1st Cir.), cert. denied, 440 So. 2d 771 (La. 1983); Transport Ins. Co. v. Ford Motor Co., 259 So. 2d 606 (La. App. 4th Cir. 1972).

96. In *Forcum-James*, defendant's negligence damaged the state's bridge, which plaintiff was contractually obliged to repair. Plaintiff's tort action was rejected by the court, but the case was remanded to give plaintiff a chance to plead a valid basis for subrogation.

Disappointingly, *PPG* is not yet having the desired effect.[97] *Illinois Central Gulf Railroad Co. v. Texaco, Inc.*[98] was a post-*PPG* case in which plaintiff, a rail carrier, mistakenly left a tank car containing chemicals owned by Air Products at defendant's yard. Defendant unloaded and used the chemicals. After paying Air Products for the loss, plaintiff sought reimbursement from defendant. Relying on *Forcum-James* and on the *result* in *PPG*, the court of appeal held that plaintiff had no cause of action in negligence, but remanded the case to permit plaintiff to plead other theories, such as "implied indemnity, depositary and LSA-C.C. Art. 2134."[99] Judge Boutall, concurring, urged that *Forcum-James* should be rejected or narrowly limited, and argued that in any event plaintiff's federal-law obligation to pay Air Products for the loss meant that plaintiff had a valid basis for recovery based on legal subrogation.

The supreme court declined to review *Illinois Central*, and no justice registered a dissent.[100] If the supreme court intends for intangible economic loss cases to be analyzed under the sensitive duty-risk approach it commended in *PPG*, it needs to review cases like *Illinois Central*. Until that happens, the *PPG* approach will remain inchoate. Meanwhile, most of the "indemnity" cases will probably continue to result in recovery for plaintiff, but it will continue to be necessary for plaintiff's counsel to structure the case so that it can be made to fit into one of the accepted pigeonholes.

C. Defendant's Negligence in Performing an Undertaking With a Third Person Causes Economic Loss to Plaintiff: The "Undertaking Cases"[101]

Louisiana plaintiffs have generally recovered in cases in which the defendant's negligent performance of an undertaking with another caused

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97. In general, *PPG* has been misconstrued in the jurisprudence. See infra text and notes 118-22.

98. 467 So. 2d 1141 (La. App. 5th Cir.), cert. denied, 472 So. 2d 27 (La. 1985).

99. 467 So. 2d at 1143. "Implied indemnity" is an unjust enrichment and/or quasi-contract theory. See Minyard v. Curtis Products, Inc., 251 La. 624, 205 So. 2d 422 (1967). "Depositary" and La. Civ. Code art. 2134 are *negotiorum gestio* principles. See A.V. Smith Constr. Co. v. Maryland Cas. Co., 422 So. 2d 697 (La. App. 3d Cir. 1982), appeal after remand, 450 So. 2d 39 (La. App. 3d Cir. 1984); Standard Motor Car Co. v. State Farm Mutual Auto. Ins. Co., 97 So. 2d 435 (La. App. 1st Cir. 1957).

100. 372 So. 2d 27 (La. 1985).

101. Analytically, many strict products liability and redhibition cases fall into this category. In the view of many analysts, recovery by a "remote" (non-privity) plaintiff for damage to or loss of use of the defective product itself amounts to economic loss recovery. See generally, Robertson, Manufacturers' Liability For Defective Products in Louisiana Law, 50 Tul. L. Rev. 50, 74-113 (1975). These decisions are not directly considered in the present article.

foreseeable economic harm. Quite often, plaintiff has been held subrogated to the contractual rights of the other against defendant.[102] In other cases, plaintiff was held to be a third-party beneficiary of defendant's contract with the other.[103] In addition, there is a strong line of authority awarding recovery on a straightforward negligence basis.

Several of these negligence decisions contain useful discussion of many of the factors that trouble courts in intangible economic loss cases. The leading decision is *Calandro Development, Inc. v. R.M. Butler Contractors, Inc.*[104] The owner of a construction project hired defendant, an engineer, to design and supervise the project. Later the owner hired a contractor to do some of the work. Plaintiff was the surety on the contractor's performance bond. When the contractor was unable to perform the work and defaulted, plaintiff paid off on the bond, and then sued defendant-engineer, contending that negligence in the design of the project caused the contractor's default and thus, plaintiff's loss. After discussing the leading common law decisions dealing with this type of economic loss problem,[105] the court held that there was no meaningful barrier to recognizing a negligence cause of action, reasoning that: (1) Defendant must be deemed to know that his services are for the protection of the contractor and the contractor's surety as well as the owner of the project. (2) Liability would not be extensive or indeterminate—it runs to a known party, for an amount certain. (3) The relationship between defendant-engineer and plaintiff, while not contractual, is very close, amounting to near-privity. The *Calandro* opinion thus invoked "floodgates factors" (1), (2), (5), and (6) in support of its recognition of the propriety of recovery.

Significantly, the *Calandro* court further held that the duty of care owed plaintiff by defendant was the same care defendant owed to the owner under the contract.[106] (The result in *Calandro* favored defendant, on the ground that no breach of duty was proved.)

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102. See Aizpurua v. Crane Pool Co., 449 So. 2d 471 (La. 1984), in which plaintiff bought a home with a bad swimming pool, and sued the contractor who had built it for a former owner. The court held that any tort or redhibition rights of plaintiff were prescribed, but that plaintiff was subrogated to the former owner's warranty claims against the pool contractor. See also Smith v. Ly, 470 So. 2d 326 (La. App. 5th Cir. 1985) (similar facts, reasoning, and outcome to *Aizpurua*).

103. See Gulf Oil Corp. v. Marine Concrete Structures, 464 So. 2d 829 (La. App. 5th Cir.), cert. denied, 468 So. 2d 1208 (La. 1985).

104. 249 So. 2d 254 (La. App. 1st Cir. 1971).

105. *Ultramares*, 255 N.Y. at 170, 174 N.E. at 441; *Glanzer*, 233 N.Y. at 236, 135 N.E. at 275.

106. 249 So. 2d at 265. Limiting the degree of care owed by defendant by the terms of defendant's undertaking with the "other" is widely regarded as sound policy. See, e.g., *Hedley-Byrne*, [1964] A.C. at 465; Dias & Markesinis, supra note 26, at 44-45. The Louisiana opinions appear to agree. In Addition to *Calandro*, see Herlitz Corp. v.

Similar cases subsequent to *Calandro* have generally cited it and followed its approach.[107] *Alley v. Courtney*[108] presented a slightly different version of the problem.[109] Defendant was a professional construction appraiser. Such appraisers are typically hired by builders to appraise and make periodic inspections of construction projects; the builders rely on these reports to get working capital. In *Alley*, a bank loaned money to a builder on the strength of a negligent appraisal by defendant. Plaintiff was a guarantor of the bank loan, and eventually had to pay. The court held that plaintiff had a negligence action against defendant, stating:

> As a professional appraiser and inspector, defendant knew or should have known that each of his reports would be relied on to the detriment of a lender if the report was erroneous. Under such circumstances, defendant's duty was not owed solely to the builder, but extended to plaintiff and others that might suffer reasonably foreseeable and direct injury. . . .[110]

Thus, the *Alley* opinion relied on "floodgates factors" (2), (5), and (6) in support of recognizing the cause of action.

It is significant that the negligence cases of the type under discussion do not treat *Forcum-James* or *PPG* as relevant. Apparently the "undertaking" cases are perceived as a discrete category. The perception seems sound. The *Calandro* and *Alley* opinions explain why the "floodgates" factors are not particularly troublesome. *PPG* should make recovery in such cases somewhat easier to achieve, but in the undertaking cases, the courts were following *PPG*'s suggested approach long before *PPG* was decided.

Matherne, 476 So. 2d 1037 (La. App. 3d Cir. 1985) (contributory negligence of assignor imputed to assignee).

107. American Fid. Fire Ins. v. Pavia-Byrne Engineering, 393 So. 2d 830 (La. App. 2d Cir.), cert. denied, 397 So. 2d 1362 (La. 1981), presented the same fact pattern as *Calandro*. The court of appeal followed *Calandro* and held the engineer liable in tort to the contractor's surety. Three supreme court justices—Dennis, Lemmon, and Marcus—would have granted writs in *Pavia-Byrne*. For other cases following the *Calandro* approach and approving recovery in similar situations, see R & R Enterprises v. Rivers & Gulf Marine Survey, 476 So. 2d 12 (La. App. 5th Cir. 1985) (no negligence found); Daniel Oil v. Signal Rental Tools & Oilfield Serv., Inc., 461 So. 2d 526 (La. App. 3d Cir. 1984); Emond v. Tyler Bldg. & Constr. Co., 438 So. 2d 681 (La. App. 2d Cir. 1982); Gurtler, Hebert & Co. v. Weyland Mach. Shop., 405 So. 2d 660 (La. App. 4th Cir. 1981), cert. denied, 410 So. 2d 1130 (La. 1982) (Justice Marcus dissenting from writ refusal).

108. 448 So. 2d 858 (La. App. 2d Cir.), cert. denied, 450 So. 2d 360 (La. 1984).

109. For yet another variant, see Pinner v. Schmidt, 617 F. Supp. 342 (E.D. La. 1985) (liability for negligent violation of the federal Fair Credit Reporting Act, 15 U.S.C. § 1681).

110. 448 So. 2d at 860.

D. Defendant's Negligent Impairment of the Environment or a Public Resource Causes Economic Loss to Plaintiff: The "Environment Cases"

At common law, the doctrine recognizing private actions for public nuisance is sometimes adduced as a settled exception to the prohibitory rule.[111] When defendant has caused a public nuisance, such as blocking a highway or a river, that doctrine permits recovery on a showing that plaintiff has suffered "particular damages," i.e., damages different in kind and degree from those suffered by the general public. Physical harm to plaintiff's person or tangible property would certainly qualify as "particular damages," but the courts have not always required physical harm in these cases. Judge Widsom's *Testbank* dissent used the "particular damages" concept as an important ingredient of the liability-limiting approach there advocated.[112]

Public nuisance concepts have largely been ignored in Louisiana.[113] Evidently only two reported decisions address the propriety of recovery of intangible economic losses produced by defendant's negligent impairment of a public resource. Neither mentions public nuisance ideas. *Pharr v. Morgan's L. & T.R. & S.S. Co.*[114] was an early supreme court decision approving recovery on behalf of a frequent business user of the Atchafalaya River who had to hire an additional steamboat because defendant had negligently blocked most of the navigable channel. The court gave no indication that it perceived any special problem with the recovery of intangible economic losses.[115] *Peltier v. Department of Highways*[116] was a recent court of appeal decision presenting a virtually identical problem, except that defendant was the state rather than a private entity. The *Peltier* opinion distinguished *Pharr* on the public/private basis and denied recovery, expressing a policy preference for leaving such injuries to rest on private businesses rather than shifting the loss to the state and hence the taxpayers.[117] Presumably *Peltier* would

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111. See, e.g., *People Express*, 100 N.J. at 259-60, 495 A.2d at 113-14. See generally *Restatement*, supra note, 6 § 821C comment (h).

112. 752 F.2d at 1046-47, 1049.

113. There is some authority suggesting that any interested citizen may sue to force removal of an obstruction to a public way. See Giardina v. Marrero Furniture Co., 310 So. 2d 607 (La. 1975).

114. 115 La. 138, 38 So. 943 (1905).

115. *Pharr* is completely inconsistent with *Forcum-James*. The progression from *Pharr* to *Forcum-James* is another example of the "typical" history discussed supra at note 78. Neither *Forcum-James* nor *PPG* refers to the *Pharr* decision.

116. 357 So. 2d 897 (La. App. 1st Cir.), cert. denied, 359 So. 2d 630 (1978) (Justice Summers dissenting from writ refusal).

117. *Peltier* thus rests on an overt preference for the state litigant, of the sort that the supreme court has repeatedly denounced as invalid on the basis of the 1974 consti-

have been decided consistently with *Pharr* had the defendant been a private entity.

The opinions in *Pharr* and *Peltier* give no indication that either court perceived any special problem with recovery for intangible economic losses. (*Pharr* was decided long before the prohibitory rule emerged in *Forcum-James*, and *Peltier* does not mention the issue.) While one might infer that the Louisiana courts perceive environmental or public resource damage cases as a discrete economic loss category which generates no grave "floodgate" concerns, probably no meaningful generalization is possible on the basis of just two decisions.

E. Summary and Conclusion

The Louisiana courts have used negligence law to award damages for intangible economic losses in the undertaking cases (and in at least one environmental case), but not in the "indemnity" and cable cases. The denial of negligence recovery in the indemnity cases cannot be explained by the floodgate factors; most of the cases just seem wrongly reasoned, and are probably explained by the relative ease of justifying recovery on the basis of subrogation, unjust enrichment, and the like. The floodgate factors do help to explain the divergent treatment of the cable cases; factors (3) through (6) seem to weigh especially heavily against plaintiffs in cable cases. But not every cable case presents significant floodgate problems. Rather than continuing to reflect the divergent treatment of these cases, the Louisiana jurisprudence should adopt the case-by-case approach espoused by the courts in *PPG* and *People Express* and by the *Testbank* dissent. This seems a much more discriminating and justice-oriented method of resolving these cases than any set of categorical rules.

Unfortunately, the *PPG* decision has been misconstrued or ignored in the subsequent Louisiana economic loss jurisprudence. As indicated above, the *PPG* majority did not seem to follow its own approach. This had led some of the courts of appeal to use *PPG* merely as additional support for continuing to apply the prohibitory rule. In *Babin v. Texaco, Inc.*,[118] defendant's negligent conduct necessitated the closure of a salt mine, depriving plaintiffs, mine employees, of their livelihood. The court of appeal affirmed summary judgment for defendant, pointing to the *PPG* result and to language in the *PPG* opinion adducing loss

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tutional provision (article 12, § 10) waiving the state's immunity in tort and contract. See, e.g., Segura v. Louisiana Architects Selection Bd., 362 So. 2d 498 (La. 1978). See also Hargrave, Statutory and Hortatory Provisions of the Louisiana Constitution of 1974, 43 La. L. Rev. 647, 653 (1983).

118. 449 So. 2d 718 (La. App. 3d Cir.), cert. denied, 456 So. 2d 165 (La. 1984) (Justices Calogero and Lemon dissenting from writ refusal).

of employment to PPG employees as an obvious part of the "indeterminate" liability that must necessarily be avoided. Two supreme court justices would have granted writs in *Babin*.[119] In *Illinois Central Gulf Railroad Co. v. Texaco, Inc.*,[120] discussed above,[121] another court of appeal used *PPG* to support denial of negligence recovery to a plaintiff who, in good faith and probably pursuant to an obligation, repaired the damage caused by defendant's negligence. No supreme court justice dissented from the refusal of writs of review in *Illinois Central*.

Further, *PPG* seems to have had an unfortunate influence on some members of the Louisiana Supreme Court. A settled rule of negligence law holds that a plaintiff who has sustained physical injury to his tangible property is entitled to recover both repair costs and other economic losses directly produced by the damage to his property. But in the supreme court's recent decision in *Borden, Inc. v. Howard Trucking Co.*,[122] three justices questioned the application of that settled rule, relying in part on a quite paradoxical application of *PPG*. In *Borden*, plaintiff hired a repair contractor to work on a piece of equipment, and the contractor hired defendant to have the equipment transported to the contractor's shop. Defendant's negligence damaged the equipment, and plaintiff sought recovery for repair costs and loss of production and profits during the delay at plaintiff's plant caused by the damage to the equipment. The supreme court majority was concerned solely with insurance issues—which of defendant's two liability insurers was responsible for the repair costs, and which for the loss of production and profits—and indicated no hesitancy as to the plaintiff's entitlement to both types of damages. However, three justices dissented, urging that recovery should be limited to the repair costs, with one justice relying extensively on the *PPG* decision in support of that position.

Obviously the full effects of *PPG* remain to be worked out by the courts. Several observations might be made about the developments to date. On the issue of intangible economic loss, courts might arrive at any one of several tenable positions: firm adherence to a prohibitory rule; general adherence to a prohibitory rule, while recognizing certain exceptions to it; or abandonment of the prohibitory rule in favor of a case-by-case application of the scope of liability principles encompassed by the duty-risk analysis. Unfortunately, a fourth position, not at all tenable, is also possible: *Announcing* that the prohibitory rule has been jettisoned in favor of duty-risk principles while *continuing in fact* to hold to the prohibitory rule. This fourth position, while it lasts, is the

119. See supra note 118.
120. 467 So. 2d 1141 (La. App. 5th Cir.), cert. denied, 472 So. 2d 27 (La. 1985).
121. See supra notes 98-100.
122. 454 So. 2d 1081 (La. 1984).

worst of all jurisprudential worlds. It invites litigation, while ultimately guaranteeing its failure. It defeats clarity and disappoints legitimate expectations. Unfortunately, the fourth position may be where *PPG* has left us. The supreme court should probably have granted writs in one or more of the post-*PPG* opinions in order to restore clarity to the situation, either by reaffirming the prohibitory rule or, much to be preferred, by demonstrating in the form of a holding in favor of liability that it has in fact been renounced.